

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA)
)
v.) NO. H-17-CR-516
)
WALTER FREEMAN JORDAN, III, et al.) October 17, 2017

MOTION HEARING
BEFORE THE HONORABLE KEITH P. ELLISON

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Proceedings reported by mechanical stenography and produced
by computer-aided transcription.

1 THE COURT: Thank you. Please be seated.

2 We'll turn to the United States v. Jordan,
3 Loring, Anderson, Santee, Wise case -- Bonner. We'll take
4 appearances of counsel beginning with the government.

14:39 5 MS. WINTER: Good afternoon, Your Honor. Heather
6 Winter and Richard Hanes for the United States.

7 THE COURT: Thank you.

8 MR. DAVIS: Good afternoon, Your Honor. Neal Davis
9 for Walter Jordan.

14:39 10 MR. AGUILAR: Frank Aguilar for Mr. Pace.

11 MR. WHEELER: Andre Wheeler for Jaylen Loring, who
12 has waived their appearance today.

13 THE COURT: One more time, please.

14 MR. WHEELER: Jaylen Loring has waived her
14:40 15 appearance here today.

16 MR. WILLIAMS: Tate Williams for Johnathon Nico
17 Wise.

18 THE COURT: Thank you.

19 MR. MAYR: Brent Mayr for Deandre Santee.

14:40 20 MR. BOTELLO: Lori Botello for Daryl Anderson.

21 THE COURT: Thank you.

22 MR. GAITHER: Good afternoon, Your Honor. Trent
23 Gaither for Mr. Bonner.

24 THE COURT: Is that everyone?

14:40 25 MR. DAVIS: I believe it is, Your Honor.

1 THE COURT: Am I correct that all the clients are
2 present except one who is dealing with a medical problem?

3 MR. AGUILAR: That's correct, Judge.

4 MR. GAITHER: Yes, Your Honor.

14:40 5 THE COURT: No problem with proceeding with that
6 defendant absent?

7 MR. AGUILAR: No problem, Judge, with Mr. Pace.

8 THE COURT: I just want to make sure nobody is
9 going to register an objection.

14:40 10 We have one defendant who is not present. Is
11 that a problem for anyone?

12 MR. AGUILAR: No objection.

13 MR. DAVIS: No, Your Honor.

14 MR. GAITHER: No objection.

14:40 15 THE COURT: Okay. We have proposed motions to
16 sever, opposed motions to continue trial, opposed motions to
17 certify case as complex.

18 I will start with the government.

19 MS. WINTER: Your Honor, I guess in the order --
14:41 20 You see all of the written responses as well as our opposed
21 motion to certify as complex. As you can tell from the
22 certificates of conference with respect to the motion to
23 certify as complex, the majority, six out of seven, are
24 unopposed to this particular motion.

14:41 25 Given that this particular case involved

1 extensive surveillance of Mr. Jordan prior to the date of
2 the robbery -- On the date prior to the robbery, there was
3 several officers who were not only tracking his phone and
4 his vehicle but were tracking him into the Katy area while
14:41 5 he surveilled the bank that they ultimately all robbed on
6 July 25th, 2017.

7 They took three different vehicles occupied by
8 all seven of these defendants and they drove to the Katy
9 area in tandem. They then robbed the bank. They conducted
14:42 10 heat runs or countersurveillance around the bank prior to.
11 All this is being surveilled by the officers on the scene --
12 numerous officers, at least 20 officers.

13 They were then -- The First Community Union
14 was robbed while the other lookout vehicles had a line of
14:42 15 sight to this First Community Credit Union.

16 All of the vehicles were traffic-stopped
17 thereafter. The occupants were taken into custody.

18 The occupants of the Toyota Tundra led police
19 on a high-speed chase.

14:42 20 Therefore, numerous --

21 THE COURT: Okay.

22 MS. WINTER: Yes, Your Honor.

23 THE COURT: Let me hear the argument against
24 certifying the case as complex.

14:42 25 MR. DAVIS: Your Honor, was I -- I think I was the

1 only person who -- on behalf of Mr. Jordan to oppose
2 complexity.

3 THE COURT: Okay. Let me hear from you, then.

4 MR. DAVIS: Your Honor, this is a simple bank
14:42 5 robbery. I understand there may be a lot of evidence in
6 this, there may be a lot of surveillance, there may be lots
7 of witnesses in this, but that doesn't necessarily make the
8 case complex. This is a simple bank robbery.

9 Of course, we're also the ones who are
14:43 10 opposing the continuance. I think that there's absolutely
11 no reason for this case to be considered complex when it's
12 just a simple bank robbery.

13 Now, I know the government has mentioned that
14 Mr. Jordan was under surveillance before and there may be a
14:43 15 large amount of surveillance concerning Mr. Jordan. That's
16 404(b). I don't think that has anything to do with the
17 robbery at hand. So --

18 THE COURT: Okay. Thank you.

19 You make good points, but consistent with my
14:43 20 previous practice --

21 Do you want to say something?

22 MR. MAYR: Your Honor, only because I am also
23 opposed on the motion to certify as complex. I'm Brent Mayr
24 for Mr. Santee.

14:43 25 The government started off their case by

1 saying that there's all this evidence prior to the robbery,
2 but, as the investors told my client at the very beginning
3 of the interview, he was never on their radar screen prior
4 to the day of the robbery.

14:43 5 So, again, this is just a simple bank robbery
6 case, at least for my client, Mr. Santee, and that is why we
7 are opposing the motion, Your Honor.

8 Thank you.

9 THE COURT: Yes.

14:44 10 MS. BOTELLO: And I just want to add in addition.
11 Lori Botello.

12 In the certificate of conference I did not
13 respond; so, they presumed that I was opposed. And we join
14 in the arguments of counsel in being opposed.

14:44 15 THE COURT: Thank you.

16 If I am at all consistent with past practice,
17 this case does deserve to be certified as complex because
18 there are multiple defendants and a lengthy time span.

19 If I do grant the motion to sever, then we'll
14:44 20 consider whether any of those cases that are severed also
21 deserve to be certified as complex or not. So, I am going
22 to grant that motion.

23 We have motions to sever. And because I am
24 certifying as complex I am going to continue the trial date.

14:44 25 All these motions to sever -- I guess I need

1 to hear from defendants on that. So, in whatever order you
2 want to go.

3 Yes, sir. Why don't you approach.

4 MR. WILLIAMS: Tate Williams for Mr. Wise.

14:45 5 I filed the first motion to sever, which Your
6 Honor has, and the basis for the motion was under Rule 14,
7 that there is a serious risk that he will be substantially
8 prejudiced by -- in such a way that it compromises a
9 specific trial right and causes him to -- causes or prevents
14:45 10 the jury from making a reliable judgment.

11 Now, that sounds complex, but it's really --
12 the resolution is simple. The government can commit to not
13 introducing evidence of the lead defendant, Mr. Jordan's
14 prior bank robberies or that they believe he was involved in
14:45 15 prior bank robberies. That's the whole basis of my motion.
16 Although they haven't given formal notice yet, we can
17 reasonably anticipate that they are going to try to
18 introduce that evidence under 404(b).

19 We understand that the surveillance that was
14:45 20 described to you by the other lawyers was only occurring
21 because he was a person of interest in previous bank
22 robberies.

23 At the detention hearing the four defendants
24 that we're alleged to have been in the Tundra put their
14:46 25 identification in issue. As you well know, that's one of

1 the per se exceptions under 404(b). So, I don't think I am
2 going out on a limb by anticipating that they may try to
3 introduce his prior bank robberies or suspicion of him
4 involved in prior rank robberies into this case.

14:46 5 The reason that prejudices my client is my
6 client was incarcerated -- Mr. Wise -- in the Texas
7 Department of Criminal Justice Institutional Division for
8 aggravated robbery. That's not admissible unless he
9 testifies and, then, only for impeachment purposes.

14:46 10 Your Honor, if the evidence of his half
11 brother, the lead defendant, Jordan Wise -- I mean -- excuse
12 me -- Walter Jordan was involved in prior bank robberies --
13 as it comes before a jury, it's going to prejudice my
14 client, Mr. Wise, unfairly because, number one, his alibi is
14:47 15 that he was in prison. If I confront and cross-examine any
16 witnesses that bring up Jordan's 404(b)s with that, then I
17 have prejudiced my client because they'll know a) he is a
18 convicted felon b) he was convicted of robbery, which they
19 otherwise wouldn't know unless he hit the witness stand.
14:47 20 So, that limits my ability to cross-examine him.

21 And, if I do do it, it prejudices him because
22 I have invited in 404(b) against my own client even though
23 it's not a bank -- it's not probably admissible otherwise
24 under any theory.

14:47 25 So, then the alternative is that, if you just

1 give a limiting instruction, the jury is going to know that
2 these gentlemen are half brothers. So, he's going to be
3 prejudiced by inference that, well, unlike Mr. Santee or
4 someone else who may not have known about his prior bank
14:47 5 robberies, it's his brother; of course he knew and he
6 decided to go along this time.

7 So, the inference that a jury may draw from
8 that evidence of prior suspected bank robberies by
9 Mr. Jordan will unduly prejudice. It's a serious, beyond-
14:48 10 substantial risk to my client that he's prejudiced by bank
11 robberies that could come in under 404(b), that there is no
12 way that he could have been involved in because he was
13 incarcerated.

14 THE COURT: Okay. Thank you.

14:48 15 Let me hear from the government and then we'll
16 go to the next defendant who wants to sever.

17 MS. WINTER: Yes, Your Honor.

18 As to -- One, I think this motion is not only
19 premature, but it also is assuming a lot of facts that
14:48 20 aren't charged, that aren't in evidence at this point.

21 The government is not ready to state on the
22 record or represent to this court that it will not seek
23 404(b) against Walter Jordan or any of the other defendants
24 for that matter or that we may not charge other crimes as to
14:48 25 Walter Jordan or other defendants in this matter.

1 But the fact that we're moving for severance
2 at this early stage, when none of that is before the Court
3 at this point --

4 THE COURT: When would be the right time to move
14:49 5 for severance?

6 MS. WINTER: Well, Your Honor, at this point, there
7 is nothing -- there's nothing charged. There is no 404(b)
8 notice out there. There's no indication of other things
9 that -- we don't plan. And that's what we told Mr. Williams
14:49 10 and Ms. Botello, is that we don't intend, at this time, to
11 charge anything else, and we don't have any 404(b) evidence
12 or information to offer them at this time, Your Honor.

13 But, even if Mr. Jordan were involved in other
14 bad acts prior to this bank robbery, there are limiting
14:49 15 instructions to handle -- there is an exact Fifth Circuit
16 pattern jury charge to handle this exact situation.

17 This particular crime was all committed in a
18 continuous course and stream. It does not make any sense
19 for the sake of judicial economy or for the sake of proving
14:49 20 this crime to sever these defendants out solely because the
21 lead defendant may have been involved in other crimes.

22 But, again, Your Honor, I believe it's
23 premature. We're not willing to say that we're not going to
24 charge anything. But, at the same time, there is no spill-
14:50 25 over effect to even talk about at this point because there

1 is nothing on the books that we intend to offer against this
2 defendant and certainly nothing that can't be dealt with
3 with a limiting instruction that's provided to Your Honor by
4 the Fifth Circuit.

14:50 5 THE COURT: Mr. Williams.

6 MR. WILLIAMS: Judge, I just wanted to add -- and I
7 didn't mention this -- that I was careful to point out in my
8 motion that we anticipated that because we had a motions
9 deadline -- ordinarily, I would file this later in the game,
14:50 10 but I was up against the motions deadline --

11 THE COURT: I understand that. I understand that.

12 MR. WILLIAMS: Thank you.

13 MS. WINTER: Yes, Your Honor.

14 THE COURT: Ms. Botello, anything you want to add?

14:50 15 MR. BOTELLO: Sure.

16 I filed a motion for severance on behalf of
17 Daryl Anderson also because of the motions deadline that was
18 imposed. I, usually, would have waited.

19 But I just wanted to bring up, Your Honor,
14:50 20 that I filed this motion because Mr. Anderson is associated
21 with this bank robbery by being in another car and leaving
22 the Third Ward area and allegedly going down Katy freeway
23 20 something miles to Katy where this bank was located.

24 And his right to call witnesses at his trial
14:51 25 would be limited if he were joined with these defendants in

1 a trial because he may want to call one of his co-defendants
2 to testify of their relationship, or lack thereof, at trial,
3 because it's our contention he hardly knows these people.
4 But he would not be able to do that if he is joined in a
14:51 5 trial with all of these defendants. And we may not
6 necessarily call all of them. It's early in the game to
7 make that decision, but it certainly is a possibility.

8 THE COURT: Thank you.

9 MR. HANES: Judge, Rick Hanes for the United
14:51 10 States.

11 Both motions are talking solely about
12 spillover effect and talking about potential testimony from
13 co-defendants.

14 As we put in our brief in opposition to the
14:52 15 motions to sever, there has been no showing by either
16 defendant at this point that there could ever be the
17 testimony of a co-defendant. You can't just raise the
18 possibility and then get a severed trial as a result of
19 that. You can't --

14:52 20 THE COURT: Are you saying it's premature? Is that
21 what you're saying?

22 MR. HANES: Well, I have never actually seen a
23 co-defendant -- in 31 years, I have never seen a
24 co-defendant end up testifying for another. Maybe I have
14:52 25 just been lucky, or unlucky, as the case may be.

1 However, it's not my burden. The case law is
2 clear and we cited it in our memorandum of contract. And I
3 would just say to the Court that raising the possibility
4 that 'It might be nice if somebody who was a co-defendant
14:53 5 were to testify on behalf of my client' -- that does not
6 satisfy the burden necessary --

7 THE COURT: Okay. I understand your point. Thank
8 you.

9 Yes, sir.

14:53 10 MR. GAITHER: Your Honor, if I might. Trent
11 Gaither for Mr. Bonner.

12 And I just want to get on the record I do not
13 have a motion for severance, but I agree with those people
14 who say that this motion is premature. From my perspective,
14:53 15 I just want to make sure that I don't waive on behalf of my
16 client --

17 THE COURT: No. This is too important an issue to
18 assert waiver. No.

19 MR. GAITHER: And the Court asked the question when
14:53 20 would be the proper time. Well, under the filings to date,
21 I would suggest that the proper time would be at that point,
22 at least, when the government does commit to respond to the
23 motions to 404(b), that, hopefully, if the Court is going to
24 extend the filing deadlines as well as the trial date --

14:53 25 THE COURT: Yeah, I am going to extend the filing

1 deadline. Yes.

2 MR. GAITHER: That's all I have, Your Honor. Thank
3 you.

4 THE COURT: Anybody else?

14:54 5 Okay. What would be an appropriate extension
6 of the trial -- of the filing deadline? Or does that depend
7 on the 404 from the government?

8 MR. DAVIS: Well, Your Honor, I think, as far as
9 any motions deadline or anything, I think we may want to
14:54 10 address the motion to continue in and of itself.

11 THE COURT: Well, I am going to grant the motion to
12 continue.

13 MR. DAVIS: Well, Your Honor, if I may as well,
14 too. We oppose the motion to continue because my client
14:54 15 wants his right to speedy trial. And, at that point, since
16 we're talking about motions to sever, I would move to sever
17 from the other defendants based on his right to a speedy
18 trial, which I think would trump judicial economy; and, of
19 course, Your Honor, I could brief the issues on that as
14:54 20 well.

21 THE COURT: Well, I know all defendants want to be
22 exonerated. Is there a specific reason? Is there something
23 else going on that he needs the trial completed by a date
24 certain?

14:55 25 MR. DAVIS: Well, not any other reason than any

1 other defendant who feels has been unjustly --

2 THE COURT: He wants to be exonerated. I
3 understand that.

4 MR. DAVIS: -- who wants to be exonerated, Your
14:55 5 Honor. And that's the whole purpose of having the Speedy
6 Trial Act, a statutory right to a speedy trial, and
7 especially in the federal system.

8 And we're collecting the evidence as it comes
9 to us. We'll be ready for a trial whenever the Court
14:55 10 determines a trial date within the 70 days from, I believe,
11 September 22nd, is when he was arraigned.

12 We just want it as quickly as possible, Your
13 Honor.

14 THE COURT: Okay. Thank you very much.

14:55 15 Anybody else on the issue of continuing the
16 trial?

17 Anybody else on the issue of severance?

18 MR. DAVIS: Other than, if the Court grants the
19 motion to continue, we move for a severance and --

14:55 20 THE COURT: Yeah. I understand.

21 MR. GAITHER: I would join the motion to sever
22 Mr. Jordan out from the other defendants, Your Honor.

23 THE COURT: You don't need to make your motion to
24 sever now in order to preserve the right to severance. I do
14:56 25 believe it's early.

1 Do you want to speak to the vulnerability of
2 this principal of a speedy trial?

3 MR. HANES: Well, Judge, I think that's what the
4 statute relative to certifying a case as complex is for.

14:56 5 THE COURT: When does the government think it could
6 be ready to try the case?

7 MR. HANES: February, Judge.

8 MR. DAVIS: Other than that, I'd ask for a trial
9 date sometime in December.

14:57 10 THE COURT: The trouble with December is it's -- I
11 mean, it's not a great time for getting jurors to serve.
12 Even if you can impanel a jury, they often want to be
13 excused.

14 Let's see if we can find a trial date in
14:57 15 January.

16 MR. DAVIS: And I make that suggestion, Your Honor,
17 of December without waiving our --

18 THE COURT: Nobody is waiving anything. These are
19 issues that are too important to invoke waiver.

14:57 20 We're going to aim for trial on January 16th.
21 The motion deadline will be 30 days in advance of the trial.

22 Anything else we can usefully do today?

23 Sir.

24 MR. WILLIAMS: Judge, could we please set an
14:58 25 earlier 404(b) disclosure date so that --

1 THE COURT: What can the government do on 404?

2 MR. HANES: Judge, I don't understand why we would
3 have to set an earlier date than the response date necessary
4 to us to respond to motions.

14:58 5 It appears to me as if all defense counsel
6 have some indication or some knowledge -- they're afraid of
7 a specific thing, I would assume. So, as long as we're
8 responding by the response deadline, I don't understand why
9 it would be necessary for us to go before that.

14:59 10 MR. WILLIAMS: Judge, if there is not a 404
11 disclosure, then there's no need to file an additional
12 supplemental motion to sever. It's a simple "chicken and
13 the egg" issue. If they can commit to doing the disclosure
14 on 404(b) prior to our motions deadline, then that may
14:59 15 obviate the need for additional motions for severance.
16 Otherwise, we're going to have to come back for leave to
17 file a supplemental or additional motion.

18 MR. HANES: Which is typical in any case, Judge.

19 THE COURT: In this case, I don't think it's
14:59 20 inappropriate of the defendant to want an earlier 404(b)
21 deadline and I wouldn't think it would inconvenience the
22 government.

23 MR. HANES: Judge, so that we're clear, though, in
24 the event that we develop 404(b) outside of that framework,
14:59 25 which is frequently the case when we start talking to people

1 who end up cooperating, would we be barred from --

2 THE COURT: No. You would petition the Court for
3 leave to file your additional 404(b) evidence and then we
4 would have a different response deadline and maybe a
15:00 5 different trial date.

6 MR. HANES: And so -- Yes. Basically, what I'm
7 saying is: I don't see the need to set a date which, in
8 common practice, will end up being impractical, because we
9 generally find out more the closer we get to trial on these
15:00 10 things.

11 THE COURT: Well, I think it's incumbent on the
12 government to accelerate the process somewhat. These are --
13 We're talking about taking a substantial hunk of time from
14 the lawyers' schedules. The defendants, I am sure, are
15:00 15 apprehensive about what awaits them. I think the government
16 should do the work it needs to do so it can make the
17 appropriate disclosures.

18 MR. HANES: And there is no question that we intend
19 to do that, Judge, my point being that it would take more
15:01 20 for the attorneys to have to respond twice rather than to
21 respond once.

22 And, again, I have not heard anything other
23 than the blanket statement that 'We want it earlier.' I
24 have not heard any rational behind that. I have not heard
15:01 25 any concrete statement, 'This is why we want it.'

1 MR. WILLIAMS: Judge, as I began my argument, this
2 has a simple resolution. We're not talking about some great
3 unknown mystery of 404(b). We're talking about whether the
4 government is going to introduce evidence of the allegations
15:01 5 against Mr. Jordan in this trial. They should know the
6 answer to that now. We know about these. There's been
7 evidence and testimony at the detention hearing. They have
8 said it's premature now.

9 Why do they need additional time right up
15:02 10 until the edge of trial to make the decision as to that
11 stuff? They have just said it's premature --

12 THE COURT: My ruling will stand. My ruling will
13 stand.

14 Is there anything else we can do today?

15:02 15 MR. HANES: No, Judge.

16 THE COURT: Thank you.

17
18 COURT REPORTER'S CERTIFICATE

19 I, BRUCE SLAVIN, certify that the foregoing is a
20 correct transcript from the record of proceedings in the
21 above entitled matter, to the best of my ability.

22
23 s/Bruce Slavin
24 BRUCE SLAVIN, RPR, CMR
25